STATE OF MICHIGAN

IN THE SUPREME COURT

NATIONAL WINE & SPIRITS, INC.,
NWS MICHIGAN, INC., and
NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiff-Appellants GK

v

STATE OF MICHIGAN,

Defendant-Appellee

and

MICHIGAN BEER & WINE
WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

Supreme Court No. ________

Court of Appeals
No. 243524 Opn 3/25/04

Circuit Court for the County of
Ingham No. 02-13-CZ

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APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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This appeal is from an opinion of the Court of Appeals dated March 25, 2004 (attached as Appendix 1) that affirmed the trial court's granting of Defendant-Appellees' Joint Motion for Summary Disposition which dismissed this case.

STATEMENT OF QUESTIONS INVOLVED

I. Does Michigan's discriminatory and protectionist statute, MCL 436.1205(3) ("§ 205(3)"), violate the Commerce Clause of the United States Constitution? If so, is it saved by the Twenty-First Amendment?

The trial court answered "No."
The Court of Appeals answered "No."
Appellants answer "Yes."

II. Does Michigan's discriminatory and protectionist statute § 205(3), violate the Equal Protection Clause of the United States Constitution? If so, is it saved by the Twenty-First Amendment?

The trial court answered "No."
The Court of Appeals answered "No."
Appellants answer "Yes."

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INTRODUCTION

This action arises out of the State's efforts to privatize the distribution of liquor in 1996. As required by the new privatization laws, the State hired Authorized Distribution Agents ("ADAs") to warehouse and distribute State-owned cases of liquor. The State actively sought out experienced and reliable companies to bid to become ADAs. As of 1996, National Wine & Spirits, Inc. ("National")[1] was the largest distributor of spirits in Indiana and one of the largest distributors of spirits in Illinois, which is why it was hired by the State of Michigan to act as an ADA and assist in the complicated transition from a public to a private distribution system.

This case challenges the validity of §205(3), which was enacted in connection with this privatization effort. As is shown in detail below, § 205(3) unlawfully discriminates against National and other potential out-of-state ADAs, because it allows Michigan wine wholesalers to become ADAs while continuing to sell all the brands of wine they were selling on September 24, 1996, while at the same time prohibiting out-of-state ADAs from selling any wines already being sold by any other wine wholesaler in Michigan. This is an incredible disadvantage for National that negatively impacts its ability to serve as an ADA.

Defendants assert, however, that even if § 205(3) discriminates against out-of-state businesses, the statute was necessary to protect the State's interests in having a stable wine wholesale system. Plaintiffs adamantly disagree. *How could it ever be in the State's interest to impair the ability of one of its agents to efficiently and cost-effectively distribute State-owned liquor?* The 1996 privatization legislation was never intended to be a goldmine for Michigan wine wholesalers. Its purpose was to get the State out of the liquor distribution business in a

[1] Plaintiffs-Appellants, National Wine and Spirits, Inc., NWS Michigan, Inc., and National Wine and Spirits, LLC are referred to collectively as "Plaintiffs."

way that would save the State money, while at the same time ensuring that its liquor was handled professionally and efficiently. It is incomprehensible that it would ever be in the State's interest to handcuff a handpicked ADA by making it difficult or impossible to compete with other ADAs.

The State has an affirmative burden of backing up its claims. As shown below, the Constitution does not permit discrimination against out-of-state companies in the absence of compelling state interests and without proof of non-discriminatory alternatives. Here, while giving lip service to these constitutional requirements, neither the trial court nor the Court of Appeals insisted that Defendants-Appellees ("Defendants") come forward with any proof that protecting Michigan companies at the expense of out-of-state companies was in the State's best interests, or that there were no less discriminatory means for accomplishing the stated purpose. Case law however, absolutely requires such strict scrutiny before countenancing any discrimination against out-of-state business.

The Sixth recently made this clear. In *Heald v Engler*, 342 F3d 517 (CA 6, 2003), the court reversed the trial court and remanded for entry of judgment in favor of the plaintiffs, local wine connoisseurs and an out-of-state winery, who had challenged those provisions of the Michigan Liquor Code that forbade direct shipment to purchasers in Michigan of wine produced out of state. Just as in the case at hand, the State defendant in *Heald* convinced the trial court that the Twenty-First amendment trumped all Commerce Clause proscriptions on discriminating against out-of-state businesses as long as the law in question promoted the core concerns of the Twenty-First amendment. The Sixth Circuit rejected this argument and ruled that when a statute violates the Commerce Clause it cannot be saved by the Twenty-First amendment, even when so-called "core concerns" of the Twenty-First amendment are implicated, unless the state meets a heavy burden of *proving that there were no other less discriminatory means for achieving the desired state goals.*[2] Just as in *Heald*, the failure of the State to come forward with anything more than its stated contention that § 205(3) furthers a legitimate public interest is fatal to its case.

The lower courts declared that § 205(3) does not discriminate against out-of-state business. This conclusion is indefensible. At the time § 205(3) was passed, there were no *non-resident* wine wholesalers in the State of Michigan *because the law* (the Michigan Liquor Control Code, MCL 436.1101 *et seq.* ["1998 Code"]) *required all wine wholesalers to have been Michigan residents for at least one year* before obtaining a wholesaling license. This is extremely significant, because, as noted above, § 205(3) forbade anyone who became an ADA from also wholesaling[3] a brand of wine in a particular area, if another wine wholesaler was already selling that brand of wine in that area, ***with one exception: every wine wholesaler who was selling a brand of wine on September 24, 1996, could become an ADA <u>and</u> continue to wholesale <u>all</u> the brands of wine it was selling on that date, <u>as well as</u> any new brand of wine not being sold by someone else.*** Thus, if an out-of-state entity such as Plaintiffs wanted to become an ADA/wholesaler, it could not compete with the local ADA/wholesalers because they would be able to sell the thousands of brands of wine they were selling on September 24, 1996

[2] This approach is confirmed by the United States Court of Appeals for the Fifth Circuit in *Dickerson v Bailey*, 336 F3d 388 (CA 5, 2003)("Dickerson II") ("All of these cases plainly reject the constitutional standard of review proffered by the Administrator in favor of a 'two tiered' Commerce Clause test, which requires us to scrutinize strictly whether a state's statutes are tailored to the Twenty-First Amendment's 'core concerns.'").

[3] Wholesale sellers/distributors of wine will be referred to in this brief as "wine wholesalers" or "wholesalers." ADAs who also wholesale wine will be referred to as "ADA/wholesalers."

while the out-of-state ADA/wholesaler would be limited to selling only new brands of wine that came on the market after 1996, or any brands that some other wholesaler decided to drop (which would generally happen only where the brand of wine was not very popular). As a matter of fact, at the time § 205(3) was enacted, there were three ADAs and NWS Michigan, Inc. was the *only ADA* that could *not* market the popular brands of wines. As will be explained in more detail below, this scheme has the indisputable effect of discriminating against out-of-state business, while simultaneously protecting local businesses then existing when § 205(3) was enacted.

It is this overtly protectionist and discriminatory statutory scheme which Plaintiffs have challenged pursuant to the United States Constitution. The United States Supreme Court has made it clear that "where simple economic protectionism is effected by state legislation 'a strict rule of invalidity must be applied.'"[4] The record is replete with admissions by Defendants that the purpose for enacting § 205(3) was to protect wine wholesalers. Given the fact that when § 205(3) was passed, as a matter of law, *all of these wine wholesalers had to be Michigan companies*, it is clear that the Legislature knew and intended that § 205(3) would protect existing Michigan wholesalers at the expense of out-of-state companies that might become ADA/wholesalers.

This case presents issues of historical importance, going to the heart of whether enactment of the Twenty-First Amendment effectively repealed other provisions of the United States Constitution or, as contended by Plaintiffs, merely added another interest that needed to be reasonably and fairly balanced against such competing interests as those expressed in the

[4] *Bacchus Imports Ltd v Dias*, 468 US 263, 270; 104 S Ct 3049; 82 L Ed 2d 200 (1984).

Commerce Clause and the Equal Protection Clause. The court below has erroneously consulted earlier decisions of the United States Supreme Court, in which the states were granted almost absolute power under the Twenty-First Amendment, not limited by the Commerce Clause or any other Constitutional provision, which decisions were subsequently refuted in *Hostetter v Idlewild Bon Voyage Liquor Corp*, 377 US 324; 84 S Ct 1293; 12 L Ed 2d 350 (1964), where the Supreme Court unequivocally stated:

> To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to repeal the Commerce Clause whenever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification . . . Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case.

Hostetter at 331-332.

Here, the lower courts have refused to strike down as violative of the Commerce Clause and the Equal Protection clause, a statutory scheme that on its face discriminates against out-of-state companies that attempt to distribute wine and liquor in Michigan. As will be shown below, this law is nothing more than blatant protectionism of local businesses, at the expense of both out-of-state business and Michigan consumers who are now losing the benefit of having real competition in the wine industry. Although the lower courts appeared reluctant to declare a state law unconstitutional, when it is so clear that a statute violates the Constitution, it is necessary that the Court step in to check the unlawful exercise of power by the legislature. Plaintiffs ask this Court to seriously consider whether discriminatory legislation such as § 205(3) should go unchallenged.

For these reasons and the reasons set forth below, this statute must be declared unconstitutional. At the very least, there are issues of fact which precluded summary dismissal.

GROUNDS FOR APPEAL AND RELIEF SOUGHT

- **The issues have significant public interest and this case is against the State**

Section 205(3) discriminates against out of state businesses who wish to wholesale wine in Michigan by severely limiting the number of brands of wine such companies can market in the state. At the same time, § 205(3) gives a select few in-state businesses the right to sell thousands of brands of wine, as long as they were selling those brands on September 24, 1996. By limiting competition, § 205(3) causes consumers in Michigan to pay more than they should for alcoholic beverages. These are issues of significant public interest.

- **This appeal challenges the validity of a legislative act and the rulings below conflict with United States Supreme Court precedent**

The scheme adopted in 1996 discriminates against interstate commerce in violation of the Commerce and Equal Protection clauses, as recognized in United States Supreme Court and Sixth Circuit Court of Appeals precedent cited in this application.

- **The issues involve legal principles of major significance to the State's jurisprudence**

The State defended this action by asserting that the Twenty-First Amendment, which outlawed prohibition, also gave the State free reign to regulate the distribution of alcoholic beverages, even if it does so in a discriminatory fashion. This defense requires the Court to consider the competing interests of the Commerce Clause and Equal Protection Clause on the one hand, and the Twenty-First Amendment on the other. As shown below, this clash of constitutional principles raises significant issues to the jurisprudence of the State. It is also likely this issue will arise again as it becomes easier for out-of-state commerce to offer consumers more variety and better prices on alcoholic beverages sold in Michigan. These issues are of major significance to the State's jurisprudence.

- **The decision of the Court of Appeals is clearly erroneous and will cause material injustice**

The decisions of the trial court and the Court of Appeals were clearly erroneous. The trial court relied on antiquated Supreme Court precedent that has been effectively overruled by contemporary decisions. The trial court granted and the Court of Appeals affirmed summary disposition for Defendants without requiring the State to meet its strict scrutiny burden of showing that § 205(3) was necessary to further a legitimate state interest, and that there were no alternative statutory schemes that did not discriminate against out-of-state business. These decisions have significantly impaired the ability of Plaintiffs to conduct business in the State of Michigan by making it nearly impossible for them to compete, given the limited number of wines they can sell. This is manifestly unjust as there is no legitimate state interest that § 205(3) supports. Its sole purpose appears to be aiding Michigan wine wholesalers that were in business on September 24, 1996.

For these reasons, Appellants respectfully ask that the decisions of the trial court and the Court of Appeals be reversed and that MCL 436.1205(3) be declared unconstitutional and void, either through peremptory order or on leave granted.

STATEMENT OF FACTS

Michigan Liquor Regulation

Following the repeal of prohibition by the Twenty-First Amendment, the Michigan Legislature enacted the Michigan Liquor Control Act of 1933 ("1933 Act"), under which there were no private distributors of spirits in the State of Michigan and the State itself, through the Liquor Control Commission ("Commission"), purchased spirits from suppliers and distributed the product to licensed retail outlets. The State followed a standard model used by numerous other states when developing its liquor distribution system. This model, frequently referred to as a "three-tiered system", intended to keep the manufacturers/importers of alcoholic beverages, the in-state wholesalers, and the in-state retailers all separate and distinct, so that there would be no affiliation or control that could be exerted by a member of one tier over a member of a different tier. Thus, for example, manufacturers could not be wholesalers or retailers. This alleviated the problems historically caused by "tied-house" arrangements which allowed manufacturers to dictate the prices that their products would be sold at both the wholesale and retail levels. This historical purpose was described by the California Supreme Court in *California Beer Wholesalers Association, Inc v Alcoholic Beverage Control Appeals Board*, 5 Cal 3d 402, 407-408; 487 P2d 745; 96 Cal Rptr 297 (1971):

> Following repeal of the Eighteenth Amendment, the vast majority of states, including California, enacted alcoholic beverage control laws. These statutes sought to forestall the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry prior to prohibition. By enacting prohibitions against "tied-house" arrangements, state legislatures aimed to prevent two particular dangers: the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns.
>
> The principal method utilized by state legislatures to avoid these antisocial developments was the establishment of a triple-tiered distribution and licensing scheme. Manufacturing interests were to be separated from wholesale interests; wholesale interests were to be segregated from retail interests. In short, business endeavors engaged in the production, handling, and final sale of alcoholic beverages were to be kept "distinct and apart."

> In the era when most tied-house statutes were enacted, state legislatures confronted an inability on the part of small retailers to cope with pressures exerted by larger manufacturing or wholesale interests. Consequently, most of the statutes enacted during this period (1930-1940) manifested a legislative policy of controlling large wholesalers; the statutes were drafted in sufficiently broad terms, moreover, to insure the accomplishment of the primary objective of the establishment of a triple-tiered system. All levels of the alcoholic beverage industry were to remain segregated; firms operating at one level of distribution were to remain free from involvement in, or influence over, any other level. (citations and footnotes omitted)

Thus, the three-tiered system was designed to protect orderly markets and promote temperance, not by discouraging competition among the members of any given tier, but by prohibiting the involvement of one tier in the business of another.

Sixty-three years after the State enacted its first liquor laws, the State ended its direct role in warehousing and distribution functions for spirit products, and in its stead adopted a system where ADAs handled these functions (in the case of beer and wine, such functions had always been handled by the private sector, under strict regulation). Under the privatized system, ADAs serve as agents of the Commission and the Commission maintains oversight responsibility.

The State of Michigan sought and received assistance from National Wine & Spirits, Inc. with respect to privatizing spirits distribution in Michigan. See Affidavit of Steven Null, attached as Appendix 2. National Wine & Spirits, Inc. was able to provide such assistance to the State because of its extensive experience with spirits distribution in other states. As of 1996, National was the largest distributor of spirits in Indiana and one of the largest distributors of spirits in Illinois. *Id.*

National has invested approximately $25 million in the State of Michigan for the creation of a system of warehousing and delivery of spirits. *Id.* It created a wholly owned subsidiary

(NWS Michigan, Inc.) for purposes of spirits distribution in Michigan. NWS Michigan, Inc. became incorporated in Michigan on October 21, 1996 and became an ADA for the State of Michigan on or about December 22, 1996. *Id.* The State admits that as part of the privatization efforts, NWS Michigan, Inc. extended offers of employment to 116 of the former Commission employees, 94 of whom accepted employment. See Answer to Complaint, ¶ 21, attached as Appendix 3.

When the State first privatized liquor distribution, it passed legislation which imposed a number of eligibility and operational restrictions on ADAs. See, MCLA 436.1205. At the time the Michigan Legislature passed this legislation, it is likely that in-state ADAs knew that NWS Michigan, Inc. was the largest and only out-of-state ADA in Michigan and that it was the wholly owned subsidiary of an out-of-state company, National Wine & Spirits, Inc. It is also likely that in-state ADAs encouraged the Michigan Legislature to enact legislation that would effectively exclude NWS Michigan Inc. and other out-of-state ADAs from serving in the combined role of an ADA of spirits and as a licensed wholesaler of wine. Appendix 2 (Null Affidavit).

The Michigan Legislature did in fact include a provision in the privatization legislation which restricts an out-of-state company from effectively serving as both an ADA of spirits and a licensed wine wholesaler in the State of Michigan. This provision, now § 205(3), prohibits an ADA who becomes a wine wholesaler, from selling or distributing a brand of wine in an area in which a wholesaler has already been assigned or authorized to sell or distribute that brand of wine ("dualing prohibition").[5] See, § 205(3). *The dualing prohibition in § 205(3) does not*

[5]"Dualing," where a wine wholesaler is permitted to sell specific wine brands in a given territory, even though other wholesalers are already selling that same brand, is the norm in Michigan—except for ADAs who became wholesalers after September 24, 1996, who can never dual.

apply, however, to the sale of a brand of wine by an ADA who was selling that particular brand in the relevant area on or before September 24, 1996.

It is not disputed that on September 24, 1996, only in-state companies were licensed as wine wholesalers in the State of Michigan. Appendix 3 (Answer), ¶ 30. Prior to September 24, 1996, every brand of wine then being sold in Michigan was already assigned to a wine wholesaler, including some wine wholesalers who later became ADAs. As a result, the dualing prohibition in § 205(3) has minimal effect on in-state ADA/wholesalers, while at the same time it effectively prohibits all out-of-state companies from serving as both an ADA of spirits and a licensed wholesaler of wine in Michigan. This is because, of the wines being sold today, more than 90% of these wines were already being sold on September 24, 1996 by in-state wholesalers, Affidavit of Gregory Mauloff, attached as Appendix 4, and would therefore be unavailable to any out-of-state ADA/wholesaler because of § 205(3). The dualing prohibition is also in conflict with the general policy enunciated in the 1998 Code, and which had been in existence for many years, which permits and encourages competition among wine wholesalers by allowing wine suppliers to "grant the right to sell a specified brand or brands in a sales territory to more than 1 wholesaler." See, MCLA 436.1307(1) attached as Appendix 5.

Section 205(3) Effectively Prohibits Plaintiffs' Entry Into The Wine Wholesaling Market

National Wine & Spirits, L.L.C. (a wholly-owned subsidiary of National Wine & Spirits, Inc.) obtained a wine wholesaling license on November 12, 1999. Appendix 2 (Null Affidavit). The dualing prohibition applies to National Wine & Spirits, L.L.C. because National Wine & Spirits, L.L.C. obtained its wine wholesaling license after September 24, 1996, see, MCL

436.1205(3), and because it is a subsidiary of the same parent company as NWS Michigan, Inc., an ADA.[6] National Wine & Spirits, Inc. and National Wine & Spirits, L.L.C. have lost substantial revenue by not being permitted to sell and distribute popular brands of wine in the State of Michigan. Appendix 2 (Null Affidavit).

Section 205(3) Effectively Prohibits Plaintiffs From Developing And Sharing Combined Cost Economies

All companies that were licensed as wine wholesalers prior to September 24, 1996 can become ADAs of spirits, and in fact, two of these companies, General and Transcom, have become ADAs.[7] Companies that serve as licensed wine wholesalers and ADAs are able to and have developed cost economies as a result of their ability to act both as ADAs and wine wholesalers ("combined cost economies"). This is admitted by the State. Appendix 3 (Answer), ¶ 40. One such combined cost economy is developed when a company delivers spirits and wine to retailers on the same truck. Companies that serve as licensed wine wholesalers and ADAs are able to and do pass on to their suppliers the benefits of combined cost economies. See generally, Appendix 2 (Null Affidavit).

Plaintiffs and other out-of-state companies are unable to develop or share with their suppliers combined cost economies because § 205(3) effectively prohibits them from serving in a combined role. Plaintiffs have lost substantial revenue because a number of their suppliers have cancelled contracts and have switched to in-state companies that are permitted to develop

[6] As noted in the Null Affidavit, the Commission has taken the position that National Wine & Spirits, L.L.C. and NWS Michigan, Inc., as subsidiaries of National Wine & Spirits, Inc., are essentially alter egos. Since NWS Michigan, Inc. is an ADA, according to the Commission, National Wine & Spirits, L.L.C. must also be treated as if it were an ADA.

[7] These two companies handle approximately 70% of the wholesale business in the State of Michigan. Appendix 4 (Mauloff Affidavit).

and share combined cost economies. Plaintiffs' $25 million investment in the State of Michigan is at substantial risk because of their inability to compete on a level playing field with in-state companies that were selling popular and profitable brands of wine before September 24, 1996. See generally, Appendix 2 (Null Affidavit). Not only does this hamper Plaintiffs' ability to sell wine, it negatively impacts their duties as the State's agent to sell liquor because the other ADAs enjoy much greater profits arising from the sale of wine that can be used to market liquor.

The Proceedings Below

This action was brought only against the State of Michigan as the action seeks to have a state statute declared unconstitutional. The Michigan Beer and Wine Wholesalers Association ("MBWWA") intervened over the objection of Plaintiffs. On May 8, 2002, a hearing was held on Plaintiffs' motion for summary disposition which sought to have §205(3) declared unconstitutional based on the Equal Protection clause. Noting that "A statute is presumed to be constitutional and the Plaintiffs bear a very heavy burden, and I think in this case they come close. They don't quite make that burden, don't quite shoulder that burden,"[8] the trial court denied the motion for summary disposition.

On August 14, 2002, a hearing was held on Defendants' Joint Motion for Summary Disposition. Plaintiffs argued, *inter alia*, that the State's burden under the Commerce Clause of showing a legitimate purpose and method for achieving that purpose was much heavier than under the Equal Protection analysis. Nevertheless and despite the trial court's earlier conclusion that Plaintiffs had come "very close" to meeting their burden of showing that there was no

[8] Transcript of May 8, 2002 hearing on Plaintiffs' Motion for Summary Disposition, ("Tr. May 8") p. 20 (attached as Appendix 7).

rational basis for §205(3), the court granted the motion, dismissing the case in its entirety. Appendix 6 (Tr. August 14), p. 20.

Plaintiffs appealed. As this area of the law is receiving notable consideration by the Federal Courts, Plaintiffs filed both a one page supplemental authority based on a decision by the Washington Supreme Court that confirmed the analysis set forth in Plaintiff's appeal briefs, as well as a motion for peremptory reversal based on a decision by the Sixth Circuit which struck down a district court decision relied on by the Defendants in the case at hand. The motion for peremptory reversal was denied. The Court of Appeals' opinion affirming the trial court was issued March 25, 2004.

ARGUMENT

I. THE STANDARD OF REVIEW IS DE NOVO

This Court reviews the granting or denial of a motion for summary disposition *de novo.* *Thomas v Board of Law Examiners*, 210 Mich App 279, 280; 533 NW2d 3 (1995). This standard of review applies to both the Commerce Clause and Equal Protection Clause arguments presented in this Application.

II. SECTION 205(3) VIOLATES THE COMMERCE CLAUSE

A. Recent Supreme Court Decisions Clarify That The Twenty-First Amendment Does Not Relieve The State Of Its Obligations Under The Commerce Clause.

The trial court held that the Twenty-First Amendment, which outlawed prohibition, gives Michigan the right to control the distribution, transportation and importation of alcoholic beverages free of Commerce Clause restrictions. Appendix 6 (Tr. August 14), pp. 18-19. As will be shown below, to reach this conclusion, the court ignored or misunderstood the conclusions reached by two seminal United States Supreme Court cases that directly addressed and rejected the arguments made by Defendants in this regard. These cases have been reaffirmed in numerous Supreme Court and other decisions and it is now beyond dispute that the Commerce Clause restricts any state that attempts to pass liquor laws which impact interstate commerce. In fact, as will be shown below, in the majority of cases involving liquor laws where the Supreme Court has weighed state concerns against those of the federal government under the Commerce Clause, the Court has declared the federal interests supreme.

It is clear that any state or local law that discriminates against interstate commerce either on its face or as applied, or that places an excessive burden on interstate commerce, violates the Commerce Clause. *C&A Carbone, Inc v Town of Clarkstown, NY*, 511 US 383, 389-390; 114 S Ct 1677; 128 L Ed 2d 399 (1994). Nevertheless, Defendants asserted, and the trial court agreed, that the Commerce Clause has been wholly displaced by the Twenty-First Amendment in the domain of state's regulation of the importation and distribution of alcoholic beverages. Defendants asserted in their motion that the Twenty-First Amendment "clearly gives Michigan the right to structure that distribution system free of Commerce Clause restraints." Appendix 8, p. 7. What is perhaps most incredible is Defendants' citation to and quotes from *California Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc*, 445 US 97; 100 S Ct 937; 63 L Ed 2d 233 (1980) and *Hostetter*, *supra*, for the ostensible purpose of supporting Defendants' claim that the Commerce Clause has been wholly displaced in the arena of alcoholic beverage distribution regulation by the Twenty-First Amendment. This reliance is misplaced.

Hostetter is the case, decided in 1964, that *refuted* the notion of earlier Twenty-First Amendment cases that suggested that the Amendment somehow trumped the Commerce Clause.

Later Supreme Court decisions generally recognize that *Hostetter* was the turning point in this discussion. When this Court reviews these cases, it will immediately see that, instead of supporting Defendants' claim, they in fact stand for the *exact opposite proposition*, i.e., that, with the limited exception of where a core concern of the Twenty-First Amendment legitimately otherwise requires, the Commerce Clause *prohibits* states from passing laws governing the distribution of alcoholic beverages, if such laws discriminate against interstate commerce.

This analysis begins with the 1964 *Hostetter* decision. After reviewing some of the same 1930's decisions relied on by Defendants in this case, the Court in *Hostetter* noted:

> To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to "repeal" the commerce clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the commerce clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."
>
> * * *
>
> Both the Twenty-First Amendment and the commerce clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Hostetter, supra at 331-332.

Likewise, after quoting these same two excerpts from the *Hostetter* case, the *Midcal* Court noted that "important federal interests in liquor matters survived the ratification of the Twenty-first Amendment." *Midcal, supra* at 108. It then held that a California law which established a pricing scheme for wine constituted a resale price maintenance scheme in violation of the Sherman Act. To reach this conclusion, the Court expressly found that Congress exercised its Commerce Clause power when it approved the Sherman Act, *id.* at 111, and that although the Twenty-First Amendment did give states significant authority to regulate the sale and distribution of alcoholic beverages, this authority was still subject to the federal Commerce Clause power as expressed in the Sherman Act. Ultimately, the Court concluded that the state's resale price maintenance and price posting statutes for the wholesale trade of wine were illegal under the Sherman Act as applied to the states through the Commerce Clause ("We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition.") *Id.* at 113.

The *Midcal* decision is particularly apropos here as the proponents of the resale price maintenance schedules in that case made the same arguments as Defendants in the case at hand. In *Midcal* the stated purpose of the resale price maintenance scheme was "protect[ing] small licensees from predatory pricing policies of large retailers." *Midcal, supra* at 112. In the case at hand, Defendants contended that § 205(3) was enacted to protect small wine wholesalers who could not compete against ADAs/wholesalers. Defendants' Brief in Support of Joint Motion for Summary Disposition, p. 13, attached as Appendix 8. In both cases, the proponents of the illegal scheme claimed that by protecting specific segments of the market, it promoted "orderly markets" (a concern identified by the trial court in the instant case, Appendix 7 (Tr. May 8) , p.19), sometimes identified as a core concern of the Twenty-First Amendment. Significantly, if the Twenty-First Amendment did not preclude the Midcal Court from striking down the resale price maintenance scheme where the state concerns identified were identical to those expressed here, there is no reason why it should aid Defendants in the case at hand.[9]

[9] See also, *324 Liquor Corp v Duffy*, 479 US 335; 107 S Ct 720; 93 L Ed 2d 667 (1987) where the Court struck down a 12% minimum markup law which was supposedly designed to "preserve competition…by stabilizing the retail market and protecting…small liquor retailers.". *Id.* at 348. Relying on *Midcal*, the Supreme Court rejected the contention that the Twenty-First Amendment

If there were any doubt about the continuing vitality of the Commerce Clause in the area of alcoholic beverage regulation by states, it was laid to rest by the Supreme Court in the case of *Bacchus Imports, Ltd v Dias*, 468 US 263; 104 S Ct 3049; 82 L Ed 2d 200 (1984), which held that an exemption for locally made liquor from a state tax imposed on all other wholesale sales of liquor was "economic protectionism," violative of the Commerce Clause. Just as Defendants argue here, the state of Hawaii argued in *Bacchus* that even if its tax exemption violated Commerce Clause principles, it was saved by the Twenty-First Amendment. The Court noted that, while some of its earlier opinions had suggested otherwise, "it is by now clear that the amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 275. In reaching this conclusion, the Court expressly relied on both *Hostetter* and *Midcal*. Justices O'Connor and Kennedy confirmed in their dissent to a later case that the earlier Supreme Court decisions giving states free reign to regulate alcoholic beverages had been overruled by *Bacchus*: "In short, *Bacchus'* rule that the Commerce Clause places restrictions on state power under § 2 in the absence of any congressional action came out of the blue. *Bacchus* overruled the *Young's Market* line in this regard and created a new rule." *James B Beam Distilling Co v Georgia*, 501 US 529, 556-557; 111 S Ct 2439; 115 L Ed 2d 481 (1991).

What is absolutely clear is that:

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insulated this law from Commerce Clause scrutiny, and found that the asserted state interest "simply [is] not of the same stature as the goals of the Sherman Act." *Id.* at 350. The Court expressly left open the question of whether a state's interest in protecting small retailers "ever could prevail against the federal interest in enforcement of the antitrust laws." *Id.* This is a clear statement by the Court that merely alleging that a statute is designed to protect some segment of the liquor distribution system is not automatically sufficient to avoid Commerce Clause limitations. At the very least, there must be some evidence that the proposed scheme does promote the interest of the small dealer, which is entirely consistent with Plaintiffs' contention here that scrutiny must be applied to a case where discrimination against interstate commerce is present, even if the Twenty-First Amendment is implicated.

> The central purpose of [the Twenty-First Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition...State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

Bacchus Imports, 468 US 263 at 276.

Thus, if § 205(3) was designed merely to protect Michigan businesses from out-of-state competition, it is clearly unconstitutional, even if some core purpose is implicated. Likewise, even if a core purpose is implicated, if §205(3) is not necessary to further that core purpose (which is another way of asking whether there is a non-discriminatory means for furthering that purpose), it must be invalidated if it discriminates against non-Michigan companies who wish to be ADA/wholesalers.

At least three United States Supreme Court cases—including two of the cases cited by Defendants for the opposite proposition—disagree with Defendants' assertion below that the state can regulate the sale and distribution of alcoholic beverages in Michigan "free" from Commerce Clause restrictions. Although, the State *can* regulate alcoholic beverages, it must do so in a constitutional manner.

B. <u>The *Heald* Case Establishes The Modern Approach To Analyzing A Commerce Clause Case That Arises In The Context Of The Regulation Of Alcoholic Beverages.</u>

As noted above, the Sixth Circuit has recently issued an opinion that unequivocally rejected the arguments made by Defendants—and accepted by the trial court. In *Heald*, the Sixth Circuit reversed the trial court and remanded for entry of judgment in favor of the plaintiffs, local wine connoisseurs and an out-of-state winery, who had challenged those provisions of the 1998 Code that forbade direct shipment to purchasers in Michigan of wine produced out of state. Just as in the case at hand, the State defendant argued that the Twenty-First Amendment trumped the Commerce Clause proscriptions as long as the law in question promoted the core concerns of the Twenty-First amendment. The Sixth Circuit flatly rejected this argument, noting:

> The central question in this case is how the "dormant" Commerce Clause and the Twenty-first Amendment interact to limit the ways in which a state can control alcohol sales and distribution.
>
> * * *
>
> The proper approach in this case, then, is to apply the traditional dormant Commerce Clause analysis and, if the provisions are unconstitutional under the Commerce Clause, to determine whether the state has shown that it has no reasonable nondiscriminatory means of advancing the "core concerns" of the Twenty-first Amendment.
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> * * *
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> Obviously, the state bears the burden of justifying a discriminatory statute, and "the standards for such justification are high."
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> * * *
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> The district court's observation that "[t]he Michigan Legislature has chosen this path to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors" and its conclusion that "the Twenty-First Amendment gives it the power to do so," without more, do not constitute strict scrutiny, as required by Supreme Court precedent. It is not enough that the Michigan Legislature has chosen this particular regulatory scheme to further what are legitimate objectives. The proper inquiry, detailed above, is whether it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co of Ind v Limbach,* 486 US 269, 278, 108 SCt 1803, 100 LEd2d 302 (1988). We find no evidence on this record that it does.

Heald, supra at 523, 524, 526 and 527.

It is clear that the trial court in the case at hand did not come close to employing the approach described above. The trial court refused to conduct a "traditional dormant Commerce Clause analysis" of § 205(3), even though Plaintiffs specifically argued that the court must determine whether there were any less discriminatory means for furthering whatever the State's interest might be in this situation. In fact, the trial court took the exact opposite approach, ruling:

> So I don't think there's much room for dispute that where the so-called core powers referred to, in the Twenty-First Amendment, are implicated, that the state's action *cannot be limited by the commerce clause*, and in this case I think those core powers are implicated.

Appendix 6 (Judge Glazer, opinion, Tr. August 14, p. 19 (emphasis added). It is clear that this belief was the cornerstone of the trial court's decision. It is also clear that trial court was wrong. *Heald* and the numerous Supreme Court and appeal court decisions that it relies on stand for the proposition that the Commerce Clause must be given its due even where the Twenty-First amendment may be implicated. *Heald* explains that the Commerce Clause must be applied before the Twenty-First amendment is considered, and if a statute violates the Commerce Clause, then the state has a "heavy burden" of establishing that it had no other choice but to pass the offending law to further the legitimate "core purpose" that motivated enactment of the law in the first place. The trial court's refusal to conduct the required "strict scrutiny" analysis alone mandates reversal of his ruling. Had he taken the time to consider these issues, it would have been clear that § 205(3) must be declared unconstitutional.

C. **The Commerce Clause Analysis.**

1. The Commerce Clause Prohibits Discrimination Against Out-Of-State Companies.

The Supreme Court has inferred from the grant of power given to Congress in Art. I, § 8 of the United States Constitution, which generally gives Congress the power to regulate commerce among the states, that as a necessary corollary to this power, state and local laws which place an undue burden on interstate commerce cannot be upheld. This principle has generally become to be known as the "dormant commerce clause." The United States Supreme Court has made it clear that "a state statute that clearly discriminates against interstate commerce is therefore unconstitutional 'unless the discrimination is *demonstrably justified* by a valid factor unrelated to economic protectionism.'" *Fort Gratiot Sanitary Landfill, Inc v Michigan Dept of Natural Resources*, 504 US 353, 360; 112 S Ct 2019; 119 L Ed 2d 139 (1992) (emphasis added). As further noted by the *Fort Gratiot* Court:

> The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition, *Baldwin v GAF Seelig, Inc*, 294 US [511], at 522-524; or to create jobs by keeping industry within the State, *Foster-Fountain Packing Co v Haydel*, 278 US 1, 10; *Johnson v Haydel*, 278 US 16; *Toomer v Witsell*, 334 US [385], at 403-404; or to preserve the State's financial resources from depletion by fencing out indigent immigrants, *Edwards v California*, 314 US 160, 173-174. In each of these cases, a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." *Philadelphia v New Jersey*, 437 US, at 626-627.

Fort Gratiot, supra at 360.

It is therefore beyond dispute that a statute which seeks to protect the business of in-state companies at the expense of foreign companies will violate the Commerce Clause unless there is a legitimate and compelling purpose for enacting that legislation. See also, *C&A Carbone, Inc v Town of Clarkstown, NY*, 511 US 383 at 392 ("Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which *the municipality can demonstrate*, under *rigorous scrutiny*, that it has no other means to advance a legitimate local interest.") (emphasis added).

Amazingly, the trial court completely ignored *Fort Gratiot* and the entire body of Commerce Clause law because the judge believed, incorrectly as confirmed by *Heald*, that he had no authority to upset legislation that regulated interstate commerce of alcoholic beverages flowing into Michigan, even it such legislation placed an undue burden on interstate commerce. Because the trial court believed it lacked such authority, Appendix 6 (Tr. August 14), p. 19, it did not even apply the tests developed by the Supreme Court to determine if a statute violated the Commerce Clause. A review of these tests, however, conclusively establishes that § 205(3) does in fact violate the Commerce Clause.

2. The Commerce Clause Test

If a state statute discriminates against interstate commerce in favor of local commerce, whether the discrimination is apparent from the face of the statute or from its effects, there is a heavy presumption that it violates the Commerce Clause. *Heald, supra* at 525; *Brown-Forman Distillers Corp v New York State Liquor Authority*, 476 US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). The Supreme Court has made it clear that a discriminatory law "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v Oklahoma*, 441 US 322, 337; 99 S Ct 1727; 60 L Ed 2d 250 (1979); *Carbone, supra*. Thus if the stated purpose is not served by the discriminatory statute, or even if it is, if there are less discriminatory means for accomplishing the purpose, the statute will be declared invalid.[10] *The burden is on the State to "demonstrate" that the law in question in fact furthers the purported state interest.* See, *Heald* at 525 and *Fort Gratiot, supra.* The trial court never considered whether the state had met this burden.

3. Section 205(3) Does Not Pass Constitutional Muster because it has a Discriminatory Effect

The discriminatory effect of § 205(3) becomes obvious when one learns that *every wine wholesaler that existed in 1996 when § 205(3) was passed, was a local, Michigan company.* This was true not because of happenstance, but by design–everyone knew, including the Legislature, that every wine wholesaler permitted to dual by § 205(3) was or would be a Michigan wine wholesaler because ***as a matter of law*** under § 601 of the 1998 Code (MCL 436.1601) *every wine wholesaler* **had to be a Michigan resident** *for a year prior to obtaining its wine wholesalers' license.*[11] Because the various sections of the 1998 Code must be read and construed as one law ("Statutes that relate to the same subject matter or share a common purpose are in pari materia and must be read together as one law," *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379; 651 NW2d 756 (2002)), the requirement in § 601 that a wine wholesaler be a Michigan company must be incorporated into the language of § 205(3) just as if it had been written there. Had § 205(3) expressly limited the right to dual to "Michigan" companies, there would be no question that it violated the Commerce Clause. See, *Lewis v BT Inv Managers, Inc*, 447 US 27; 100 S Ct 2009; 64 L Ed 2d 702 (1980) (Statute that prohibited

[10] As will be shown below, § 205(3) does not serve the stated purpose of protecting the "middle tier" of the wine distribution system, but even if it did, there is a better means available that does not unfairly discriminate against interstate commerce.

[11] Such residency requirements themselves violate the Commerce Clause. See, *Cooper v McBeath*, 11 F3d 547 (CA 5, 1994).

out-of-state holding companies from operating subsidiaries in Florida declared unconstitutional). The fact that the limitation is written in § 601 of the 1998 Code is of no moment for this Commerce Clause analysis.[12] The effect of these two sections of the 1998 Code, when read together, is to prohibit all out-of-state wholesaler/ADAs from ever being able to sell thousands of brands of wine that were being marketed by Michigan wholesalers on September 24, 1996. [13]

Thus, not only did every Michigan wine wholesaler receive the opportunity to become an ADA, it was also blessed with the right to maintain all of the brands of wine it was selling in 1996, as well as any new wines it could acquire after that date, while still acting in the capacity of an ADA.

The impact on interstate commerce is obvious. Because of the one-year residency requirement in the 1998 Code, no one that was not a Michigan resident on September 24, 1996 ***can ever*** obtain the advantage of selling brands of wine that were already being sold on that date, as well as new brands of wine. As a result, every out-of-state company that may want to become an ADA must decide whether it is worth doing business in Michigan as an ADA if it will necessarily compete with other ADAs who are also wine wholesalers who can sell popular brands of wine that the out-of-state ADA cannot. If it is true, as Defendants adamantly assert in this litigation[14], that a wine wholesaler who is not an ADA cannot compete with an ADA that is a wine wholesaler because it will not have the same economies that will make it competitive

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[12] The *Heald* court read together several statutory sections to reach the conclusion that the law discriminated against interstate commerce ("As the district court correctly noted, this distinction between in-state and out-of-state wineries can only be understood by reading a number of provisions in conjunction with each other…"). *Heald* at 342 F3d 520-521.

[13] As the Court can imagine, and as set forth in Appendix 4 (Mauloff Affidavit), there have not been that many new wines brought to market since 1996, and certainly not that many profitable new wines.

[14] In support of their argument that there was a legitimate purpose for enacting § 205(3), i.e., to protect the middle tier of the wine distribution system.

with the ADA/wine wholesaler, it is also true that *an ADA* that can only sell limited brands of wine cannot compete with an ADA that can sell all the wines it was selling on September 24, 1996. Thus it is clear that few if any out-of-state companies would be willing to enter the ADA market in Michigan as they will know that they will have to compete with the wine wholesalers who are already acting as ADAs, and potentially with any other wine wholesaler that sold wines on September 24, 1996 who at some point in the future decides to become an ADA. Raising such a competitive barrier is precisely the type of conduct prohibited by the Commerce Clause and is the rankest sort of economic protectionism. *See, Bacchus, supra,* (Court declares state tax on alcoholic beverages unconstitutional because it grants an exception for locally distilled liquors); *Carbone, supra,* (Court declares statute unconstitutional because it prohibits out-of-state waste disposal companies from competing for local disposal business); *Cooper, supra,* (Court declares Texas residency requirement for mixed beverage permit unconstitutional because it shielded in-state operators from outside competition). Despite this obvious impact on out-of-state commerce, the Court of Appeals inexplicably refused to find that § 205(3) discriminated against interstate commerce. This was clear error.

4. Section 205(3) Does Not Pass Constitution Muster Because It Fails Strict Scrutiny

It is thus clear that § 205(3) discriminates in favor of Michigan wine wholesalers and against out-of-state companies, and must therefore pass the strict scrutiny test. *Heald, supra.* To pass strict scrutiny, the State has to demonstrate that the statute furthers a legitimate core concern of the Twenty-First Amendment, and that there are no less discriminatory means for accomplishing the state's goals. Section 205(3) fails on both counts.

a. Section 205(3) Fails Strict Scrutiny Because There Is No Twenty-First Amendment Core Concern Implicated Here.

Given that it is clear the § 205(3) violates that Commerce Clause, it can only be saved if it passes the second prong of the *Heald* test—is there a core purpose implicated? Section 205(3) cannot satisfy this test.

Most of the cases have generally agreed that promotion of temperance is a core concern. See, *CA Dickerson v Bailey*, 212 F Supp 2d 673, 674 (SD TX, 2002) ("*Dickerson I*"); *North Dakota v United States*, 495 US 423, 432; 110 S Ct 1986; 109 L Ed 2d 420 (1990); *Pete's Brewing Co v Whitehead*, 19 F Supp 2d 1004, 1018 (WD MO, 1998) ("A state's desire to promote temperance is clearly legitimate pursuant to the Twenty-First Amendment."). This makes complete sense as this amendment was in effect reversing the ultimate temperance enactment—prohibition. While the Twenty-First Amendment did away with prohibition, in its place, states were given the authority to adopt laws to promote temperance as a means for protecting the health and safety of their citizenry. Courts have also identified other core concerns underlying the Twenty-First Amendment, for example, permitting states to raise revenue from the sale of alcoholic beverages, *Dickerson I* at 696; *Bainbridge v Turner*, 311 F3d 1104, 1115 (CA 11, 2002), and ensuring "orderly markets," *id.; Dickerson I* at 696; *Pete's Brewing Co, supra* at 1019; and *North Dakota, supra* at 432.

Protecting the stability of the middle tier does not implicate a core concern of the Twenty-First Amendment. It does not promote temperance (and would arguably have the opposite effect), it does not raise revenues, and it does not ensure orderly markets as that term is generally used in the context of the Twenty-First Amendment. As noted above in the Statement of Facts, the alcoholic beverage market was made "orderly" by the implementation of tied-house laws that kept the manufacturing, wholesaling and retailing tiers completely separate from each other. The purpose of this separation was to prohibit manufacturers from having too much influence over the sale and distribution of their products, apparently with the idea of protecting consumers from prices that were too high (gouging) or too low (promoting intemperance and dependence that then opened the door to gouging). Thus, any statute that is directed toward this separation of the tiers of the distribution system arguably could have some effect on "orderly markets".

Section 205(3), however, only deals with the occupants of the middle tier of the distribution system. It does not address the separation of the three tiers, and really does not affect the system as a whole. It is designed only to protect the individual licensees of one level of the system, and does not ensure orderly markets as that phrase is used in Twenty-First Amendment cases.[15]

Thus, there is no legitimate core concern implicated here.

b. Section 205(3) Fails Strict Scrutiny Because The Statute Does Not Further The Stated Purpose—It Does Not Protect The Stability Of The Wholesale Market

As noted above, it could never be in the State's interest to impair the ability of its ADAs to efficiently and cost-effectively warehouse and distribute state-owned cases of liquor. For the State here to even suggest this is ludicrous. Nevertheless, according to Defendants, the purpose of § 205(3) was to protect Michigan wine wholesalers from competition from companies who

[15] The court in *Bainbridge* noted: "As for 'ensuring orderly markets,' we are not sure what that phrase means, but it certainly does not mean discrimination in a way that effectively forecloses out-of-state firms from the Florida market." *Bainbridge* at 1115. The same can be said here.

were ADA/wholesalers, thereby allegedly ensuring an adequate number of wholesalers to keep the market "stable." It ostensibly achieves this protection by prohibiting ADAs from dualing with regard to wines.

A moment's reflection, however, leads inescapably to the conclusion that § 205(3) does not protect the wine distributors represented by the MBWWA from ADA/wholesalers, because it in fact *grants an exception from its prohibition on dualing* to every wine wholesaler who was marketing a particular brand of wine on September 24, 1996. Here, as noted in the Mauloff Affidavit (Appendix 4), the exception has already had the effect of swallowing the rule, as the two Michigan companies who are currently ADA/wholesalers handle 70% of the wine wholesale market in Michigan and therefore directly compete with the other wine wholesalers represented by the MBWWA. If there is a concern about the stability of the wholesale market—by which Defendants apparently mean there will be too few wholesalers for the market to be stable (Plaintiffs do not accept that stability is dictated by mere numbers)—because competition with ADA/wholesalers will be too great for the wholesalers causing them to quit the business, then it makes no sense to have included the exception for wines being sold on September 24, 1996. The practical effect of this exception is to guarantee that only two wine wholesalers will be left standing, as General and Transcon already had the lion's share of the wine business in 1996, and with the additional competitive edge of being an ADA as well, no one, except another ADA/wholesaler, would be able to compete with these giants.

In the context of the Commerce Clause, Defendants' stated purpose cannot survive the scrutiny which the law requires a court to bring to bear on any law which discriminates against interstate commerce. The *State* has the burden of "demonstrating" that its discriminatory law is necessary to further its stated purpose. This is in fact an "affirmative defense" the must be proven by the State. *Bainbridge, supra* at n. 13; *Heald*, *supra* at 15. The State has not met its burden, nor can it, as the logic of the above arguments proves. Even if one assumes that protecting the middle tier of the wine distribution system is a "core purpose", not only is § 205(3) not "necessary" to protect the stability of the middle tier, it actually threatens it in a significant way.

More importantly, for purposes of their motion for summary disposition, the Defendants failed to present any evidence to support their affirmative defense that § 205(3) has or will further a core concern of the Twenty-First Amendment. To date, this statement has been pure speculation. The lower courts gave only lip service to the underlying principles of the Commerce Clause by accepting at face value the State's assertions and defenses concerning an orderly and stable wine wholesale distribution network. This is not enough to meet the State's obligations under the Commerce Clause. As noted by the *Heald* court:

> The district court's observation that "[t]he Michigan Legislature has chosen this path to ensure the collection of taxes from out-of-state wine manufacturers and to reduce the risk of alcohol falling into the hands of minors" and its conclusion that "the Twenty-First Amendment gives it the power to do so," without more, do not constitute strict scrutiny, as required by Supreme Court precedent. It is not enough that the Michigan Legislature has chosen this particular regulatory scheme to further what are legitimate objectives. The proper inquiry, detailed above, is whether it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co of Ind v Limbach*, 486 US 269, 278 (1988). We find no evidence on this record that it does.

Heald, supra at 527.

Thus it is clear, even if protection of wine wholesalers and the stability of the wholesale market was a core concern of the Twenty-First Amendment and the intended goal of §205(3), it fails miserably to achieve this goal and therefore cannot withstand strict scrutiny under the Commerce Clause. At the very least, there is a question of fact whether § 205(3) affects the stability of the market.

c. Section 205(a) Fails Strict Scrutiny Because There Are Better Alternatives.

If protection of wine wholesalers and the wholesale market had truly been the goal of § 205(3), this goal could have been much more effectively accomplished by just prohibiting ADAs from becoming wine wholesalers. If ADAs cannot wholesale wine, then the middle tier of the market would continue along just as it had successfully done prior to the passage of § 205(3). This would have been more fair to the ADAs as well, as they would not have to compete against other ADAs who have the incredible advantage of being able to dual wines which they were selling as of September 24, 1996. Thus there would be level playing fields in both the liquor and wine distribution systems and no danger of market instability. This was a simple and elegant solution to this alleged problem, one which the legislative history suggests was the original intention of the authors of the legislation. This intention was apparently corrupted by the interests of the existing wine wholesalers who wanted the best of all worlds.[16] Senate Legislative Analysis, SB 1171(S-3), November 12, 1996 (attached as Exhibit E to Defendants' Brief below, attached as Appendix 9, here). For this reason as well, under the strict scrutiny test, § 205(3) cannot stand.

[16] The fact that the exception for existing *wine wholesalers* found its way into a statute that was privatizing the market for *distilled spirits* raises a strong inference that the exception was included in response to pressure from lobbying groups who were trying to protect wine wholesalers from out-of-

It is therefore clear that § 205(3) must be declared unconstitutional because it does not implicate a core concern, it does not further the purpose identified by the State and there are simple, more effective alternatives that would in fact further that purpose that were rejected by the State.

5. The Fact That Some Michigan ADAs Might Also Be Precluded From Dualing Does Not Save § 205(3) From Invalidity.

Defendants asserted below that § 205(3) is not discriminatory because it applies equally to any ADA licensed after 1996, whether in-state or out-of-state. The trial court seemed to accept this conclusion as well. Appendix 6 (Tr. August 14), p. 19. This argument makes no sense as it ignores the favorable treatment given to all Michigan wholesalers who were selling wine on and before September 24, 1996. This purely in-state sector of the wine business received a huge benefit with the passage of § 205(3). The trial court ignored this fact.

The Supreme Court has made it abundantly clear that a law that otherwise discriminates against interstate commerce is not redeemed merely because it has disadvantages for some *local* businesses as well. In *Fort Gratiot, supra,* the statute declared unconstitutional essentially precluded counties from accepting waste generated anywhere but in that county. It was challenged by a landfill company that wanted to accept waste from non-county sources. The United States District Court refused to declare the statute in violation of the Commerce Clause because "[T]he statute does not discriminate against interstate commerce 'on its face' because the import restrictions apply 'equally to Michigan counties outside of the county adopting the plan as well as to out-of-state entities.'" *Fort Gratiot* at 357-358. This is the same argument made by Defendants in the case at hand. The Supreme Court was not impressed:

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state competition.

> In *Dean Milk Co v Madison*, 340 US 349 (1951), another Illinois litigant challenged a city ordinance that made it unlawful to sell any milk as pasteurized unless it had been processed at a plant "within a radius of five miles from the central square of Madison," *id.*, at 350. We held the ordinance invalid, explaining:
>
> > "[T]his regulation, like the provision invalidated in *Baldwin v Seelig, Inc*, [294 US 511, 55 (1935)], in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. 'The importer ... may keep his milk or drink it, but sell it he may not.' *Id.*, at 521. *In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.*" *Id.*, at 354.
>
> *The fact that the ordinance also discriminated against all Wisconsin producers whose facilities were more than five miles from the center of the city did not mitigate its burden on interstate commerce.* As we noted, it was "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.*, at 354, n. 4.
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> * * * *
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> In short, neither the *fact that the Michigan statute purports to regulate intercounty commerce in waste* nor the fact that some Michigan counties accept out-of-state waste provides an adequate basis for distinguishing this case from *Philadelphia v New Jersey* [where the Court struck done a similar waste statute].

Fort Gratiot, supra at 362-363. (emphasis added). See also, *Carbone, supra* at 391-392 ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition...The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute.")

There is no reason to distinguish between *Fort Gratiot* or *Carbone* and the instant case. The mere fact that § 205(3) may negatively impact future Michigan companies that want to become ADA/wholesalers is completely irrelevant to the question of whether it discriminates against out-of-state companies who wish to do the same. Just as in *Carbone*, there is a distinct implication that § 205(3) was passed to favor its two primary beneficiaries, Transcon and

General, which just makes its "protectionist effect . . . more acute." Because the statute undeniably discriminates in this manner, it must pass strict scrutiny before it can be upheld. As shown above, § 205(3) cannot meet this standard.

Thus it is clear that § 205(3) does discriminate against interstate commerce and cannot be saved by the Twenty-First Amendment. It should be declared invalid.

III. ON ITS FACE § 205(3) DENIES PLAINTIFFS THE EQUAL PROTECTION OF THE LAW

As shown above, § 205(3) discriminates against a certain class of business. This discrimination also violates the Equal Protection Clause because there is no rational basis for it. Its sole purpose is to protect local entities. The Courts have consistently ruled that such a purpose, without more, is unconstitutional.

A. General Requirements of Equal Protection

The 14th Amendment to the United States Constitution states "…nor shall any State …deny to any person within its jurisdiction the equal protection of the laws." Likewise, art. I, § 2 of Const. 1963 states that "No person shall be denied the equal protection of the laws…". These two constitutional provisions guarantee that every citizen will be treated equally under the law. This generally means that any law or government action which treats a class of citizens differently—whether imposing a restriction or providing a benefit—will be scrutinized to determine whether there is a good reason for making a distinction between those citizens. Where no fundamental right is implicated, for such a distinction to survive constitutional attack, it must bear a rational relationship to a legitimate state purpose. *Massachusetts Board of Retirement v Murgia*, 427 US 307; 96 S Ct 2562; 49 L Ed 2d 520 (1976).

Courts generally employ a two-step process when analyzing statutes challenged on equal protection grounds. First, they attempt to identify the purposes of the statute and determine whether those purposes are legitimate. Second, having identified the governmental purposes as legitimate, courts then must determine whether the distinction between classes is rationally related to the achievement of the legitimate state interest. *Penn Mut Life Ins Co v Department of Licensing and Regulation*, 162 Mich App 123, 130; 412 NW2d 668 (1987) ("...the test is (1) does the legislation have a legitimate state purpose and (2) was it reasonable for lawmakers to believe that use of the challenged classification would promote that purpose.")

B. <u>Application of Equal Protection To § 205 (3)</u>

1. Classification Based On September 24, 1996.

In the case at hand, § 205(3) defines two obvious classes, i.e., ADAs who were wine wholesalers before September 24, 1996, and ADAs who were not. It then treats these two classes differently by imparting a benefit to the pre-1996 class that is not available to the post-1996 class.

Plaintiffs have been unable to imagine a legitimate state purpose for creating these two classes distinguished only by the date September 24, 1996. Nor does there appear to be a logical connection between this date and any underlying policy supporting § 205(3). The statute itself did not become effective until December 19, 1996 (1996 PA 440) so this is not a situation where a change was made on the effective date of the legislation. Everything about this statute and the way it was adopted suggests that this was an arbitrary date selected solely for the purpose of protecting existing local wine wholesalers who would be given an unfair competitive advantage over any future ADA who would not effectively be able to wholesale wine while acting as an ADA.

a. *Mayflower Farms v Ten Eyck.*

In a case which is similar to the situation at hand, in the sense that it involved a statute which conferred a benefit on one class of people based on whether they had been in business before a particular date, the United States Supreme Court held that the statute in question was unconstitutional because it violated the equal protection clause. In that case, *Mayflower Farms v Ten Eyck*, 297 US 266; 56 S Ct 457; 80 L Ed 675 (1936), which involved milk dealers, the Court concluded that the statute was passed in "an attempt to give an economic advantage to those involved in a given business at an arbitrary date as against all those who entered the industry after that date." 297 US 275. The Court specifically held that it could discern no legitimate state purpose for setting up classifications of milk dealers who sold milk before a particular date as opposed to milk dealers who sold milk after that date.

The provision at issue in *Mayflower Farms* was intended to regulate milk prices for the general public benefit. It allowed dealers who sold milk prior to the date specified in the statute to charge $.01 less per quart than similar dealers who came into the market after that date. The Court noted that the practical effect of the law was to preclude anyone from entering the milk business after the specified date as they would be unable to compete with those dealers who enjoyed the benefit of selling at the lower price.

The milk law that was declared unconstitutional in *Mayflower Farms* is identical in its operation to § 205(3). Both statutes confer an economic advantage not previously enjoyed by a class of the regulated community, merely because that class existed prior to a specified date.

Both statutes select a date which existed prior to the effective date of the statute creating the benefit. Both statutes effectively ensure that other similarly situated members of the regulated community which do not enjoy the benefit will not be able to compete as a practical matter as a result of the statute. The Court in *Mayflower Farms* recognized that the statute regulating milk dealers was not a legitimate grandfather provision which would regulate a business or activity "in the interest of, or for the protection of, the public", *Id.* at 274, but was rather an attempt to give an economic advantage to those engaged in the business on an arbitrary date as against all those who entered the industry after that date. Section 205(3) also is not a legitimate grandfather clause as it gives a new benefit (as opposed to not taking away an existing right or status) to Michigan wine wholesalers who were in business on September 24, 1996, while denying that benefit to wholesalers licensed after that date. There is no basis for distinguishing § 205(3) from the milk statute in *Mayflower Farms* and just as that statute was declared unconstitutional, § 205(3) should be declared unconstitutional in violation of the equal protection clause of the Constitutions.

b. Michigan case law.

There are numerous examples in Michigan case law where the courts have found statutes unconstitutional as violative of equal protection. One case which is particularly instructive is *Hertel v Racing Com'r, Dept of Argiculture*, 68 Mich App 191; 242 NW2d 526 (1976). In that case, legislation provided funding to any stadium authority organized "before December 1, 1971." *Id.* at 196. When the law was passed, everyone knew that only the Pontiac Stadium Authority met this restriction. The Court of Appeals had no trouble seeing the error in such legislation:

> We do find, however, one part of the statute to be constitutionally defective. Appropriations under the act are limited to stadium authorities which were organized before December 1, 1971. As a practical matter, the class created by the act was narrowed by the time limit to one city--Pontiac, as it maintains the only existing stadium authority which was created by that date. There is nothing wrong per se with the fact that one city alone benefits from legislation. But the act creates a class of several members who are entitled to equal treatment. *Class legislation must be '(U)niform in its operation upon all persons of the class to which it naturally applies; but if it fails to include and affect alike all persons of the same class, and extends immunities or privileges to one portion and denies them to others of like kind, by unreasonable or arbitrary sub- classification, it comes within the constitutional prohibition against class legislation.'* *Haynes v Lapeer Circuit Judge*, 201 Mich 138, 141--142, 166 NW 938, 940 (1918). [footnote omitted]
>
> It is generally recognized that local classifications must be created *so as to include future members who might qualify and they may not be based on existing circumstances only so as to exclude members of the class who might qualify in the future.* [FN8]
>
> FN8. See 16 Am.Jur.2d, Constitutional Law, s 503 and cases cited therein.
>
> No rational basis has been demonstrated for distinguishing between stadium authorities created before December 1, 1971 and those that may be created thereafter. Such time limitation, therefore, is unconstitutional. We find the provision, however, to be severable; [footnote omitted] the remainder of 1972 P.A. 5 is valid.

Hertel, supra at 199-200. (emphasis added).

This is the same situation as in the case at hand. Section 205(3) picks an arbitrary date by which the huge benefit of being able to effectively "dual" is awarded to a limited class of players, i.e., those who were already selling brands of wine on September 24, 1996. Thus, any ADA that did not obtain a wine wholesaler's license prior to that date is completely out of luck. There is no reason why "future members"—ADAs who become wine wholesalers after September 24, 1996—should be excluded from the benefits of this legislation, any more than the stadium authorities organized after December 1, 1976 could be denied financing in the *Hertel* case. Just as the legislation in *Hertel* was patently designed to protect a limited class and was therefore unconstitutional, § 205(3) was designed to give existing wine wholesalers the enormous advantage of being able to sell wine and liquor, while precluding latecomers from competing on level ground. It must also be declared unconstitutional.[17]

In another Michigan case, *Beauty Built Const Corp v City of Warren*, 375 Mich 229; 134 NW2d 214 (1965), the plaintiffs sought a declaration that an ordinance passed by the city created two classes of citizens and treated one of the classes unfairly. The ordinance in question imposed a sewer tap charge on all construction completed after a specified date. In finding the ordinance unconstitutional, the Court stated:

> This Court has repeatedly held that classification of objects to which a municipal ordinance may be made applicable must be based on natural distinguishing characteristics and must bear a reasonable relation to the object of the ordinance. See *Palmer Park Theatre Company v City of Highland Park*, 362 Mich 326, 106 NW2d 845 [(1961)]; *Mulloy v Wayne Counarty Board of Supervisors*, 246 Mich 632, 225 NW 615 [(1929)].
>
> Where an ordinance fails to include and affect alike all persons of the same class, and extends immunities or privileges to one part and denies them to others of like kind by unreasonable or arbitrary classification, the same is contrary to the equal protection guarantees of the State and Federal Constitutions. See *Haynes v Lapeer Circuit Judge*, 201 Mich 138, 166 NW 938, LRA 1918D, 233 [(1918)].
>
> In the case before us no reasonable or rational foundation has been submitted to support the exemption and classification created by the ordinance. The date January 13, 1959, seems to have been chosen simply because it was the date defendant city decided to begin raising additional revenues. It certainly was not chosen because it formed a reasonable or rational date for establishing a division of a class.

Beauty Built, at 375 Mich 235-236.

[17] In *Hertel* the offending language was severed from the statute. The same result should occur here.

In the case at hand, the same can be said for the decision to "extend immunities or privileges" to wine wholesalers who were licensed before September 24, 1996. September 24, 1996 is not "a reasonable or rational date" for creating a distinction between ADAs who also wish to wholesale wine. In *Beauty Built* at least the selection of the date was motivated by nothing more than convenience; in the case at hand it would appear that this decision was calculated to preclude a segment of the industry from conducting a business in Michigan.[18] At any rate, *Beauty Built* makes it clear that arbitrary and irrational discrimination cannot be condoned by the State. See also, *Stimson v Muskegon Booming Co,* 100 Mich 347; 59 NW 142 (1894)(Court declares unconstitutional statute which permits company that has sustained losses to collect larger toll than a company that has been profitable, noting, "This is class legislation…It is not possible that…the legislature…confer upon one corporation rights which, under precisely similar circumstances, it denies to another, or greater rights and privileges upon one than are conferred upon another."); *Palmer Park Theatre Co v City of Highland Park*, 362 Mich 326; 106 NW2d 845 (1961) (Court declares legislation unconstitutional that taxes users of air conditioning equipment using over 5 tons of water, but not units using less than 5 tons, stating, "The classification must be based upon substantial and real differences in the classes, which are germane to the purpose of the law and reasonably suggest the propriety of substantially different legislation….").

[18] This is admitted by Defendants who told the trial court that the date was purposely selected to pre-date the enactment of the statute so that those licensees who did not already have significant brands of wine before the cut-off date could not "rush" to try to pick up as many brands of wine as they could. Appendix 7 (Tr. May 8), pp. 6-8.

c. Classification Based On Domestic vs. Foreign.

As noted above, when § 205(3) and § 601 are read together, the effect is that only Michigan companies who are ADAs are permitted to dual with regard to wines. Not only does this scheme violate the Commerce Clause, it also violates Equal Protection because it favors one class, domestic wholesalers, over another class, foreign wholesalers. This "domestic/foreign" dichotomy has been addressed by numerous courts:

> We hold that, unlike in *Ward* [*Metropolitan Life Ins Co v Ward*, 470 US 869 (1985)] , the purpose advanced by the state is legitimate (i.e., making insurance coverages available to residents), but the means chosen are not rationally related to promoting that purpose. The classification scheme is based on residency. Although it is not required that close distinctions be drawn in making classifications, the foreign/domestic classification scheme made here affords no opportunity for a foreign insurer to share in the tax preference given to domestic insurers if it desires to offer insurance in the areas of greatest public need despite the lower profit potential. The classification scheme also permits a domestic insurer to obtain a tax preference over foreign insurers even if the line of insurance offered is in a more lucrative market. Thus the classification is both under and over inclusive and not rationally related to promoting insurers to offer insurance in the high loss ratio areas such as medical malpractice, farm owners multiple peril, liquor liability, municipal liability, and product liability.
>
> *If the state's purpose is broader than just providing insurance in hard-to-insure markets and instead encompasses the general purpose of encouraging the creation of domestics, we would find the purpose was not legitimate, based on Ward.* The taxing scheme does, in fact, seem more rationally related to promoting domestics than to encouraging insurance companies to provide policies in the less lucrative areas. There is no indication that taxing domestic companies more, or foreign companies less, would change the fact that foreign companies are less likely to provide insurance in high loss categories and domestics will see an open market and provide the insurance. The taxes imposed do not serve as an incentive to provide insurance in high loss categories.
>
> We, therefore, find that the taxing scheme presently used is unconstitutional…

Penn Mutual Life Ins Co, supra at 132 (emphasis added). See also, *Williams v Vermont*, 472 US 14, 22; 105 S Ct 2465; 86 L Ed 2d 11 (1985)("Whatever the general rule may be, to provide a credit only to those who were residents at the time they paid the sales tax to another State is an arbitrary distinction that violates the Equal Protection Clause."). In *Williams*, the state of Vermont gave residents who bought a car in another state an exemption from its use tax, while denying the same exemption to non-residents. This is comparable to § 205(3) which gives an exemption to Michigan wholesalers from the newly imposed limitation on dualing to the extent they were selling a brand of wine prior to September 24, 1996. This benefit went only to Michigan residents because of the requirements of § 601. It is therefore unconstitutional.

d. Section 205 is not a "Grandfather Clause".

The trial court and Court of Appeals found that § 205(3) is a "grandfather clause" of the sort frequently found in federal and state legislation, and held that because of this it was not unconstitutional. The point the courts missed is that merely calling something a grandfather clause does not mean that it does not have to comply with the constitution, including the Equal Protection clause. *Peoples Rights Organization, Inc, v City of Columbus*, 152 F3d 522, 531 (CA 6, 1998). This conclusion alone by the trial court is grounds for reversal.

Section 205(3), however, is not even a "grandfather clause" as that term is generally used in the law. The typical grandfather clause is found in a statute imposing a new restriction on a regulated group. The grandfather clause allows the group members currently possessing some status to retain that status even though they do not comply with the new restriction. It *is* legitimate for a state to honor the "reliance" interest that a group member may have in the state of the law pre-dating the relevant change. *Id.* For example, a few years ago, lawyers who were admitted to the Michigan Bar prior to a certain date were not required to attend continuing legal education courses ("CLE"), while attorneys admitted after that date were required to satisfy the annual requirement. The first category of attorneys were "grandfathered" and could retain their licensed status without complying with the new law. Grandfather clauses are essentially a compromise – the law is changed to add restrictions to benefit the general public welfare, while at the same time not imposing too harsh a burden on existing members of the regulated community who selected a career or business, or made other decisions in reliance on a certain state of the law.

This is far different from the situation at hand. *Section 205(3) placed no new restrictions on the operations of existing wine wholesalers.* They therefore did not need the protections of a grandfather clause as they had no "reliance" interest in becoming an ADA as there were no ADAs until the statute was passed. Unlike the lawyer who would have had to comply with the CLE requirements or stop practicing law (but for the operation of the grandfather clause), existing wine wholesalers were able to continue operating exactly as they had before §205(3) was passed. Wine wholesalers could become ADAs if they wanted to, but they did not have to become ADAs to maintain their status as wine wholesalers. The sole effect of § 205(3) was to give existing wine wholesalers an *additional benefit* that they had never before enjoyed, *i.e.*, the right to be both a wine wholesaler *and* an ADA. It was only when they made this voluntary choice that § 205(3) imposed any restrictions on their operation. If they did not choose to become ADAs they suffered no burden at the hands of § 205(3). It is thus clear that § 205(3) is not a grandfather clause.

The trial court's explanation of why § 205(3) is a grandfather clause, even though it imposes no restrictions on wine wholesalers, is difficult to understand. Judge Glazer stated that wine wholesalers should be able to become ADAs without losing the benefit of the business that they had developed and the investment they had made. What he did not acknowledge is that no wine wholesaler was in any danger of losing that business *unless it voluntarily elected to become an ADA.* Thus, the extraordinary circumstance that the government is imposing new rules in the middle of the game did not occur here. The new law created another business opportunity for wine wholesalers—and its attendant restrictions on dualing—only *if they chose to accept it.*[19]

The Court of Appeals was even more confused in its desire to find a legitimate grandfather clause. Plaintiffs argued that the right to be an ADA/wine wholesaler was newly conferred by the privatization law, and could not be the basis of a true grandfather clause. The Court of Appeals disagreed, noting "A wine wholesaler could become and ADA both before and after September 24, 1996," Appeal opinion, p. 6, apparently contending that the pre-1996 ADAs should be grandfathered. This statement is patently erroneous, as recognized by the Court of Appeals itself in the ***immediately preceding*** paragraph where it noted "Before 1996, there were no ADAs…"

Of course, the lobby for the MBWWA could not leave well enough alone, and made sure that its members not only got the opportunity to become an ADA, but also an overwhelming

[19] The Court of Appeals was even more confused. Plaintiffs argued that the right to be an ADA/wine wholesaler was newly conferred by the privatization law. The Court of Appeals disagreed, noting "A wine wholesaler could become and ADA both before and after September 24, 1996." Appendix 1. (Appeal opinion), p. 6. This statement is patently erroneous, as recognized by the Court of Appeals itself in the immediately preceding paragraph where it noted "Before 1996, there were no ADAs…"

advantage vis-à-vis any new business coming into the state. This is not fair, nor is it constitutional, and the lower courts' decisions permitting it should be reversed.

2. There Is No Legitimate Policy Supporting § 205(3)

The lower courts seemed to accept Defendants' explanation that § 205(3) was designed to protect small wine wholesalers from competition by ADA/wholesalers. A moment's reflection reveals the fallacy of this argument. If the Legislature truly believed there was some evil in having combined operators in Michigan, it could have easily addressed the problem without impinging on the rights of the existing wine wholesalers by merely passing a law which would not permit *anyone* to be both an ADA and a wine wholesaler. Existing wine wholesalers could continue to conduct their business just as they had done before with no adverse impact from the legislation. They would be competing only with other wine wholesalers just as they had always done.

Likewise, the newly created ADAs could operate their businesses and would be in competition only with other ADAs. If there is such an evil to combined operators, this sort of legislation would have solved the problem, provided a level playing field for all the businesses involved, and would have created no hardships for any existing businesses. Section 205(3), of course, eschewed this approach in favor of giving a huge advantage to existing wine wholesalers. As there is no rational basis for the scheme adopted by § 205(3), and since it unfairly discriminates against ADAs who were not licensed wine wholesalers before September 24, 1996, it must be declared unconstitutional.

3. Summary Disposition Based On Equal Protection Was Warranted

Plaintiffs initial motion for summary disposition was brought pursuant to MCR 2.116(C)(10) as there was no dispute with regard to any material issue of fact. The only issue for the trial court to determine was whether § 205(3) should be declared unconstitutional as a matter of law. *Stevenson v Reese,* 239 Mich App 513; 516, 609 NW2d 195, (2000) ("The constitutionality of a statute is a question of law that we review de novo."); *Michigan State Employees Ass'n v Liquor Control Com'n*, 232 Mich App 456, 463; 591 NW2d 353 (1998). Defendant denies that the statute violates the constitutional proscriptions, but for the reasons set forth above, Plaintiffs believe that the court should have declared that § 205(3) is unconstitutional.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court, either peremptorily or on leave granted, reverse the lower courts' decision refusing to grant Plaintiffs' motion for summary disposition. In the alternative, Plaintiffs would ask that the lower courts' orders granting and affirming Defendants' joint motion for summary disposition be reversed, and as there can be no dispute that 1) § 205(3) is mere economic protectionism, 2) that there is no legitimate core concern implicated by § 205(3) and 3) that the Defendants cannot meet their burden of establishing that the State needs § 205(3) to further any core concern, that judgment declaring § 205(3) is unconstitutional be entered peremptorily or on leave granted by this Court. At the very least, the trial court's order dismissing this case should be reversed, and it should be remanded for further proceedings.

Respectfully submitted,

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